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Supreme Court of the United States

OCTOBER TERM, 1931.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY ..... *Petitioner,*

v. No. 674.

EFFIE K. SIMPSON, AS ADMINISTRATRIX OF THE ESTATE OF A. E. SIMPSON, DECEASED ..... *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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I.

STATEMENT OF THE CASE CORRECTING INACCURACIES AND OMISSIONS CONTAINED IN BRIEF FOR PETITIONER.

In petitioner's brief, statement of the evidence supporting respondent's right to recover on the doctrine of the last clear chance is confined to the last 14 lines at the bottom of page 5 and the first line at

the top of page 6. That meager statement is inadequate and inaccurate. We call the court's attention to the following facts, in addition to those stated in petitioner's brief, which support respondent's recovery on the ground of discovered peril, or the last clear chance:

Not only engineer Simpson, but the entire crew on the southbound train, before leaving Pine Bluff, received order No. 104, giving them right-of-way over train No. 18 (the north-bound train with which they collided) from Pine Bluff to McNeil (R. 22, 30, 41). No order was ever received by conductor DeMaine, or any other member of the crew of the south-bound train, extending the right-of-way of that train over train No. 18 any further south than McNeil. When this south-bound train arrived at McNeil, train No. 18 had not reached that point. It was the duty of the crew of the south-bound train to wait at McNeil for the arrival of train No. 18. Brakeman Dorman testified:

> "Q. After you got to McNeil, what was done, if anything, what was said, if anything?
>
> "A. I remember that we got an order at McNeil. The conductor was standing in the door of the caboose. I was on the lower step. The train was moving along slowly and I thought it was going to stop, and I had intended to cut the crossing there at the public highway crossing, so Key, the agent, was standing there with an order in his hoop and handed it to me and I caught it with my left hand. The caboose took a lunge like we were leaving. I shoved the order open and read it and then handed it to conductor DeMaine.

"Q. What did the order say?

"A. It said: 'Second 18 Eng. 778 meet Extra 775 South at Stamps.'

"Q. All right, go ahead?

"A. The caboose took another lunge. At that time the caboose was about that road crossing. DeMaine was standing there in the door of the caboose, so he went on into the caboose, and when the caboose got down about halfway between the depot and the passing track switch DeMaine came out of the caboose on the right-hand side of the train and says 'high ball the switch.' High Ball in railroading means to go ahead (R. 42).

* * *

"Q. Go ahead; you went into the caboose?

"A. I went into the caboose and asked conductor DeMaine where we were going for No. 18. He says, 'Let's see what we got out of Pine Bluff on 18.' I says to him, 'What did you get here on No. 18?' He says, 'All we got here was an order to meet Second No. 18 at Stamps.' I says, 'Is that all you got here?' He says, 'Yes.' I says, 'Pull the air as you haven't got anything on No. 18 then, stop this train.' He says, 'I will pull the air.' He told me not to pull the air. Craig was standing there and he told Craig to get up there and hand him the orders; Craig did that and while he (DeMaine) was looking at them, we hit. I says, 'Pull the air and then look at the orders.' I started to pull the air but he told me not to."

* * *

"Q. About how far out on the main line were you when you asked conductor DeMaine about the orders and when you told him to pull the air, and when you started to pull the air and

he told you not to pull the air; how far were you from this switch?

"A. 6, 8 or 10 car lengths", (R. 43).

* * *

"Q. The only order he got at McNeil was to meet Second 18 at Stamps, as you have just detailed to the jury?

"A. Yes, sir.

"Q. Did he ever pull the air?

"A. No, sir."

* * *

"Q. DeMaine, he was your conductor on the Extra 775 South?

"A. Yes, sir.

"Q. You were under him?

"A. Yes, sir.

"Q. According to the rules and regulations he had charge of the train?

"A. Yes, sir" (R. 44).

Brakeman CRAIG testified:

"A. I was in the cupola looking down, so I hollered out 'No. 18 isn't here yet.' At that time the local was still standing on the main line. I says, 'If you haven't got anything more on No. 18 you had better stop.' He didn't say anything. By that time Dorman had gone out of my sight. I don't know what happened to him. I immediately got down out of the cupola and I met the conductor coming in at the door, so I asked him what he had on No. 18 (R. 24).

"Q. All right, go ahead Mr. Craig, I believe you stated that you met conductor DeMaine coming in at the door?

"A. Yes, I asked him what he had on No. 18, and he says, 'We have a meet with Second No. 18 at Stamps.' I says, 'If you haven't got something on No. 18, you haven't got it, pull the air' (R. 25).

* * *

"Q. I would like for you to state what was said when he came in at the door?

"A. When he came at the door of the caboose, I asked him what he had on No. 18; he told me that he had a meet with Second 18 at Stamps. I says, 'If you didn't get something on No. 18 here, you haven't got it. Pull the air.' He told me to hand him the orders out of the cupola that he had received out of Pine Bluff."

* * *

"Q. Where was the caboose then with reference to the depot, the time you got down out of the cupola and handed the conductor the orders?

"A. Near the highway road crossing; just a little south of the highway crossing.

"Q. That is south of the depot?

"A. Yes, sir.

"Q. About how far south of the depot is that crossing?

"A. Just a short distance, I couldn't say exactly.

"Q. The switch where you went out on the main line is how far south of the highway crossing?

"A. About 30 or 35 car lengths.

"Q. On down to the switch where you went onto the main line?

"A. Yes, sir (R. 26).

"Q. What did you mean when you told him to pull the air?

"A. I meant for him to stop the train.

"Q. Was there some apparatus on the caboose where the air could be applied?

"A. Yes, sir.

"Q. What was it, please?

"A. Air valves.

"Q. Where was it located?

"A. In three different places on the caboose.

"Q. Where, please?

"A. There is one located on the north end, one on the south end, and one up in the cupola of the caboose.

"Q. How long would it take to work either one of those apparatuses?

"A. That depends on where you are.

"Q. If you could reach one?

"A. Just a short time.

"Q. Can you give the jury some idea?

"A. All that is necessary is to press down on the valve.

"Q. That releases the air and it immediately takes effect?

"A. Yes, sir, it locks the wheels of the train.

"Q. You stated that he had no other orders on No. 18 except what he had gotten at Pine Bluff?

"A. None that I knew anything about.

"Q. While you were standing there with conductor DeMaine, did anybody else come in?

"A. Yes, Dorman came in; however, I don't think he came in until we had passed over the south switch.

"Q. Dorman was the other brakeman?

"A. Yes, sir.

"Q. When he came in, tell the jury what he said to conductor DeMaine?

"A. He told him to pull the air and read the orders later.

"Q. Did the conductor do that?

"A. No, sir" (R. 27).

This south-bound train in charge of conductor DeMaine, on which engineer Simpson was killed, contained 43 cars and the caboose (R. 27).

These cars averaged about 40 feet in length, so that this train was about 1,760 feet in length (R. 54).

The caboose had not gone more than 10 car lengths, or 400 feet, south of the south end of the switch onto the main line at the time Brakeman Dorman reminded conductor DeMaine that he did not have any order in regard to train No. 18 except the order requiring them to meet it there at McNeil, and told the conductor to pull the air and started to pull the air himself and was ordered by the conductor not

to do so (R. 43). So the front end of the train at that time was less than 2,200 feet south of the south end of the McNeil switch. If conductor DeMaine had pulled the air, or permitted brakeman Dorman to pull it, when Dorman urged him to do so, the train could easily have been stopped in a distance of 12 or 15 car lengths, or 500 or 600 feet (R. 29, 45).

By actual measurement, the distance from the south end of the McNeil switch down to the point where the engines of the two trains collided is 5,641 feet (R. 53). Throughout this entire 5,641 feet, the track is straight and there was no obstruction to have prevented the men on the engine of train No. 18 from seeing the south-bound train, if conductor DeMaine had pulled the air or permitted brakeman Dorman to pull the air and stopped the train, when urged to do so by Dorman; and, since the front end of the south-bound train was then less than 2,200 feet south of the McNeil switch and the train could have been stopped in 500 or 600 feet, the front end of that train, if conductor DeMaine had pulled the air or permitted the brakeman to pull it when urged to do so, would not have been, when stopped more than 2,800 feet south of the switch, which would have left a clear space of more than 2,800 feet between the front end of the south-bound train, if its conductor had permitted it to be stopped when urged by his brakemen to do so, and the north end of the north-bound train when that train reached the point where the collision occurred, affording ample distance for the north-bound train No. 18 to have been stopped after

coming into plain view of the south-bound train. Train No. 18 had just rounded a sharp curve when the collision occurred.

The collision, therefore, was caused by the negligence of conductor DeMaine, not in forgetting the terms of order 104, which required him to stop at McNeil until train No. 18 arrived, nor in misconstruing order 132, which was the only order he received at McNeil and which told him to meet train Second 18 at Stamps, but by his later negligence in failing to pull the air and stop his train and in refusing to permit his brakeman, Dorman, to do so, after his attention had been pointedly called by both of his brakemen to the fact that the train was proceeding on the main line in positive violation of the orders, making a collision with train No. 18 imminent.

II.

ARGUMENT

Counsel for petitioner, in their brief, say that "under controlling Federal decisions where there was a violation by the injured of dike safety train orders, with resulting collision, it was held there could be no recovery even though there was also a failure of some other employee to perform his duty"; and counsel then cite five decisions of this court which they say sustain their contention. But in no one of the cases cited by petitioner was the issue of discovered peril, or the doctrine of the last clear chance, in any way involved; and, since that is the only issue involved in the instant case, it follows that none of the cases cited by petitioner can have any controlling effect in the case at bar. In no one of the cases cited by petitioner was it contended by the party seeking to recover that, after the injured party's negligence had placed him in peril, any other servant of the railroad company had discovered his peril in time to have saved him from injury by the exercise of reasonable care; but, in every one of the cases cited by petitioner, the contention of the party seeking to recover was, that the injury was caused by the concurrent and contemporary negligence of the party injured and certain other servants of the railroad company, and recovery was sought under the doctrine of comparative negligence, it being admitted in every one of said cases the negligence of the party injured contributed as a concurrent proximate cause

of the injury. But in this case the only ground on which respondent sought to recover damages was:

> "On account of the conduct of DeMaine, conductor upon said train, who carelessly, negligently and recklessly, after discovering the peril of the deceased, A. E. Simpson, failed to apply the air brakes from the rear and stop said train, thereby causing the train upon which deceased was riding to collide with another train operated by the agents and servants of the defendant upon said main line, causing the deceased to receive injuries from which he thereafter died" (R. 3, 12, 89).

The first case cited by petitioner is *Great Northern Railway Co.* v. *Wiles*, 240 U. S. 444. In that case, Wiles was rear brakeman on a freight train which broke in two by the draw-bar pulling out of the sixth car from the engine, which caused the train to stop instantly. Wiles was riding in the caboose at the rear end of the train, which was run into from 3 to 5 minutes later by a passenger train following it and he was killed. The administrator of his estate sued the railroad company, charging negligence against the company in permitting the draw-bar to pull out. The evidence in the case showed that, when the train stopped after the draw-bar had pulled out, it then became the duty of Wiles, who was the rear brakeman, to "go back immediately with stop signals a sufficient distance to insure full protection." Instead of performing that duty that devolved upon him when the train stopped, he remained in the caboose for 3 to 5 minutes and until the passenger train ran into the caboose and killed him. Of course, this court held in that case that the

negligence of Wiles himself in failing to perform the duty that devolved upon him when his train broke in two and stopped to go back immediately with stop signals so as to prevent the other train from running into his train, was the sole proximate cause of his death. His negligence was the sole proximate cause of that collision because, even if the company had been negligent in permitting the draw-bar to pull out, Wiles' negligence was committed after he had discovered the effect of such negligence on the part of the company and in ample time to have avoided any damage therefrom if he had performed the duty that devolved upon him after the draw-bar had pulled out and the train had stopped. In that case, the accident occurred at a sharp curve and the men on the engine of the passenger train did not know and could not have known of the presence of the train that had stopped in front of them until they were upon it, and no negligence at all was charged against them. So that, in the Wiles case, the question determined by this court was whether the negligence, if any, on the part of the railroad company in permitting the draw-bar to pull out, contributed as a proximate cause to the death of Wiles; and this court held, that since Wiles, by the performance of the plain duty that devolved upon him after the draw-bar pulled out, could easily have prevented the passenger train from running into his train, that his failure to perform that duty which he had an opportunity to perform after he discovered the negligence of the company, if any, in permitting the train to break in two, was the sole proximate cause of his death.

But in the case at bar, the negligence of the deceased engineer, Simpson, was committed when he misread order 132 at McNeil as directing his train to proceed to Stamps and meet train No. 18 there, whereas the order said for them to meet *Second* 18 at Stamps instead of train No. 18, and that act of negligence, on his part, was committed when he misread said order 132 and left the switch at McNeil and pulled out onto the main line; while the negligence of conductor DeMaine, on which respondent based this suit, was committed after the said negligent act of the engineer had been performed and after the conductor had discovered the peril brought about by its performance; for the negligence of conductor DeMaine, upon which respondent relied for recovery in this case, consisted in the conductor's refusal to pull the air, or to permit his brakeman, Dorman, to pull it, in the caboose and thereby stop the train, after both of the brakemen in the caboose had pointedly reminded the conductor that the train was proceeding southward on the main line in violation of orders and was in immediate peril of colliding with train No. 18.

The next case cited by petitioner is *Frese* v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1. In that case, Frese was engineer on a Burlington train and was killed by a collision between his train and a Wabash train at a point in Illinois where the tracks of the two roads crossed. An Illinois statute put the duty solely upon the engineer, when approaching such a crossing, to bring his train to a full stop and "positively ascer-

tain that the way is clear and that the train can safely resume its course before proceeding to pass the crossing." Of course, engineer Frese violated his duty under said statute, or the collision could not have occurred. His administratrix based her suit upon the contention that the fireman was also negligent in not discovering the other train and she offered evidence tending to show that the fireman was seen to be looking straight ahead when, if he had looked to the left, he could have seen the other train; and it was contended that the fireman thus contributed to the cause of the collision. There was no contention whatever in that case that the fireman, or anyone else, discovered that the engineer had negligently failed to perform his duty and had thereby put himself in peril, the contention of the plaintiff in that case being that the fireman was as ignorant of the peril as was the engineer himself. If, in the Frese case, it had been shown that the fireman discovered before the collision occurred, that the Wabash train was approaching the crossing and that the engineer was not aware of it and then, after discovering such perilous situation, the fireman had refused to do anything to stop the train and avoid the collision, then the Frese case would have been similar to the case at bar; but, had such been the facts proved in the Frese case and had the administratrix of Frese's estate based her suit upon the doctrine of discovered peril, as respondent has done in this case, there can be no doubt but that this court would have held the railroad company liable for the death of Frese upon

the ground that the failure of the fireman to exercise reasonable care to stop the train after such discovery of the peril, would then have been the sole proximate cause of the collision.

The next case cited by petitioner is *Davis* v. *Kennedy*, 266 U. S. 147. In that case, Kennedy was engineer on train No. 4 running westward out of Nashville. He was killed by his train colliding with train No. 1 running eastward toward Nashville, at a point just west of a place called Shops. Train No. 1 had the right-of-way west of Shops and the crew of No. 4 had instructions never to pass Shops unless they knew that No. 1 had arrived there. Between Nashville and Shops the conductor on No. 4 told Kennedy that the train was crowded and he would depend upon Kennedy to look out for train No. 1, which Kennedy agreed to do; but Kennedy failed to look out for train No. 1 and ran his train on beyond Shops and collided with train No. 1. This court, in that case, held that the negligence of Kennedy, under the facts of that case, was the sole proximate cause of his death and that his administratrix could not recover; but the facts in that case are not at all similar to the facts in this case. If, in that case, the conductor, after telling engineer Kennedy to look out for train No. 1 at Shops, had been told by his brakemen, as their train was leaving Shops, that train No. 1 had not arrived at Shops and that they were in imminent peril of meeting it on the main line upon which they were proceeding and if the conductor had been urged by his brakemen to pull the air

and stop their train at a time long enough before the collision occurred to have afforded ample opportunity for him to do so and thereby avoid the collision, and if the conductor, after being so informed by his brakemen of the negligence of his engineer and the peril of the situation and after having been so urged by his brakemen to stop the train, had refused either to pull the air himself or to permit his brakemen to do so, then the case of *Davis* v. *Kennedy* would have been similar to this case; but, if such had been the facts in that case and if that suit had been based upon the doctrine of discovered peril as the present case is, there can be no doubt that this court would have held the administratrix of Kennedy had a right to recover for his death.

The next case cited by petitioner is *Yadkin R. Co.* v. *Sigmon*, 267 U. S. 577 (186 N. C. 519). That case is no more in point than the other cases cited by counsel, and for the same reason. There was no discovered peril in the Sigmon case. In that case, all of the train crew alike forgot their order to wait at Yadkin Junction for the other train, and none of them discovered the oversight until the moment the collision occurred. There was no discovery of the mistake of engineer Sigmon by the conductor or brakemen until the other train was upon them and it was too late for anybody to do anything to avoid the collision; and, since engineer Sigmon had committed the same act of negligence in forgetting the order to wait at Yadkin as the other members of the crew had done, and since his own negli-

gence and theirs were simultaneous, but his own more immediately connected with his death than theirs, it was held that his own negligence was the sole proximate cause of his fatal injury. But in the case at bar, the negligence of engineer Simpson in misreading order 132 as meaning that they should meet No. 18 at Stamps, instead of Second 18, was not simultaneous with the negligence of conductor DeMaine in refusing to pull the air and stop the train himself or to let his brakeman, Dorman, do it, after the train had pulled out on the main line and after both brakemen in the caboose with conductor DeMaine had reminded him that order 104 to hold their train on the siding at McNeil until No. 18 arrived was being violated and urged him to pull the air and stop the train. The said negligence of conductor DeMaine in refusing to stop the train or permit his brakeman, Dorman, to stop it, after his attention had been called by both of his brakemen to the perilous situation, occurred after the negligence of engineer Simpson had been committed and after the conductor had discovered the peril, and the said negligence of the conductor was, therefore, the sole proximate cause of the collision and of Simpson's death.

The only other case cited by counsel for petitioner in support of their said contention is *Unadilla Valley R. Co.* v. *Caldine*, 278 U. S. 139. In that case, Caldine was the conductor. His orders required him to hold his train at Bridgewater until train No. 15 had passed. Instead of obeying said order, he commanded the

motorman of his train to proceed out of Bridgewater without waiting for the arrival of train No. 15 and on account of Caldine's disobedience of his orders his train collided with train No. 15 and he was killed. His administrator sued the railroad company charging negligence on the part of the motorman in obeying the orders given him by conductor Caldine to proceed out of Bridgewater without waiting for the arrival of train No. 15. In holding that, under the facts of that case, Caldine's administrator could not recover for his death, this court said:

> "Certainly the relation between the parties is to be taken into account. It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the railroad company that employed him to say that the collision was due to anyone but himself. He was in command. He expected to be obeyed and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered."

If, in the instant case, conductor DeMaine had been killed and his administrator were suing the railroad company for his death, charging negligence on the part of brakeman Dorman for his failure to pull the air and stop the train, notwithstanding his failure to do so was in obedience to the orders given him by conductor DeMaine not to do so, then there would be a case similar to the Caldine case, *supra*, cited by petitioner. But in the case which the administratrix of the deceased engineer Simpson has brought for his death,

engineer Simpson did not order conductor DeMaine to commit the act of negligence complained of by respondent. It is true that engineer Simpson had, just prior to the time that said negligence of the conductor was committed, himself committed an act of negligence in misreading order 132 and pulling out upon the main line; but the perilous situation thereby created was expressly pointed out to conductor DeMaine by both of his brakemen in the caboose with him, and one of them urged the conductor to pull the air and stop the train and started to do so himself, but the conductor refused to let the brakeman pull the air and stop the train and refused to do so himself, but permitted the train to run 5,600 feet after the brakeman urged that the air be pulled and the train stopped before the fatal collision occurred.

The doctrine of the last clear chance, or discovered peril, has been fully recognized and upheld by this court; and it applies in every case where the defendant discovers the negligence of the plaintiff and the peril thereby created, in time, by the exercise of reasonable care after discovering such peril, to avoid the injury, but fails to use the means available to him to prevent the injury.

In *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, this court held (quoting syllabus):

> "Plaintiff's contributory negligence cannot exonerate defendant and bar plaintiff's recovery where defendant might, by the exercise of reason-

able care and prudence, have avoided its consequences."

In *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, 428, this court said:

> "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years, (having been first enunciated in *Davies* v. *Mann*, 10 Mees. & W. 546) that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

And in *Chunn* v. *City & Sub. Ry.*, 207 U. S. 302, it was said:

> "Nor is it clear that, even if the plaintiff was not free from fault, her negligence was the proximate cause of the injury. If she carelessly placed herself in a position exposed to danger, and it was discovered by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury."

The principle of law thus recognized by this court, on which respondent solely relied for recovery in this case, is sometimes called the doctrine of discovered peril; for it puts the duty upon everyone who discovers

another in a position of peril to use all the means reasonably in his power to prevent injury to the person in danger, however much that person may have been to blame in getting into the perilous situation.

The degree of the negligence of the person in peril, however gross, will not defeat his recovery for his injury, if the defendant had a reasonable opportunity to avoid the injury after discovering the peril.

This same principle of law is also sometimes called the doctrine of the last clear chance; for it makes it the duty of him who has the last clear chance to avoid an injury to do all he reasonably can do to prevent that injury, regardless of the negligence the one in peril may have committed in bringing about the dangerous situation.

The kind or degree of negligence of the person in peril whereby he has brought his peril upon himself is not material, and, however gross, it will not prevent his recovery for his injury, if the defendant, after discovering the danger in time to prevent the injury by reasonable use of the means at his command, has the last clear chance to avoid the harm and fails to do so. Under this rule, the comparison of negligence has no place. It is not a question of whose negligence is the *greatest*, but the question is, whose negligence is the *latest*?

This doctrine has also been called the humanitarian rule; for, when a person is found in peril, the law does not stop to inquire how great was his own

fault in bringing the danger upon himself, but demands that whoever finds another in danger shall make reasonable use of the means at his command to save another from peril, *even though the one in peril may* have brought the danger upon himself solely by his own gross negligence.

If this doctrine be applied only in cases where the person whose danger is discovered has been but slightly negligent in getting into the danger, and if, where a person is discovered in peril which it appears he has brought upon himself by his own gross negligence, those who discover him in such perilous situation may refuse to make reasonable effort to save him after so discovering his plight and excuse their conduct by saying the negligence of the victim of their apathy was so gross as to make his death a fitting punishment for his carelessness—then will humanity be taken out of this humanitarian rule, and the doctrine of discovered peril destroyed.

On page 11 of petitioner's brief, counsel say:

> "Even were the last chance doctrine applicable to a case of this kind, it is not applicable to this case because the conductor in the caboose did not know the engineer was violating the stop and wait order, or that there was an outstanding stop and wait order, until the very moment of the collision, when it was too late for him to do anything."

A statement of the undisputed facts shows that the conductor of the train was fully advised of the

situation and of the danger in time to have avoided the accident. No stronger evidence could be marshalled to establish *this fact than* the evidence produced in this case.

There was only one order given to the train crew on train 775 that referred to train No. 18, and that order was to meet train No. 18 at McNeil. The crew only received one order at McNeil, and this order did not refer to train No. 18, but was an order to meet second 18 at Stamps. When the two brakemen learned what order had been received at McNeil they knew at once that the train should not leave the side-track at McNeil. And before the train had scarcely started to move out on the main line, Brakeman Craig reminded the conductor that he had no orders permitting him to go out on the main line against No. 18, urged him to pull the air and stop the train, the conductor at the time having in his hand the only order received at McNeil and knowing that only one order had been issued against train No. 18, and that they had come to McNeil on it. After the train had gone out on the main line and the caboose had passed the switch, Brakeman Dorman came into the caboose and reminded the conductor that they were out on the main line against train No. 18, in violation of their orders, and realizing their extreme danger, did everything in his power to cause the conductor to act, and moved by the inaction of the conductor, started himself to pull the air and stop the train and was ordered by the conductor not to stop the train. The brakemen did all

in their power to avoid the danger. They were reasonable men and prudent men; they knew the danger; they wanted to act, and, had they possessed the power that the conductor did, the train would have been stopped and deceased would not have been injured, but the conductor, made aware of the danger, carelessly delayed action until it was too late. In so doing, he violated Rule No. 107 of the company, that states: "In case of doubt or uncertainty, the safe course must be taken" (Tr. 84). And also he violated all the laws of prudence and reason.

The train orders proclaimed the danger; the brakemen knew the danger; they told the conductor of the danger; as reasonably prudent men they wanted to act and avert the danger and save human life. The conductor, in utter disregard of the picture portrayed by the orders, by repeated urgings of the brakemen, refused to act and stood there "throwing dice with destiny" till the collision occurred, and in the eyes of the law, having the last chance to save human life, his negligence became the sole, proximate cause of the death of the deceased.

It is not disputed that had the conductor acted when Brakeman Craig conversed with him, when he urged him to pull the air and stop the train before they left the sidetrack, or later when Brakeman Dorman urged him to pull the air and stop the train after they were out on the main line, the danger would have been averted and the deceased would not have been killed.

The conduct of Conductor DeMaine, as shown by the evidence, brings this case squarely within the doctrine of the last clear chance, as that doctrine was defined in this case, in the case of *Kansas City Southern Ry. Co.* v. *Ellzey*, 275 U. S. 236. In its opinion in that case, on page 241, this court said:

> "This language suggests that the Circuit Court of Appeals thought this case to be governed by the doctrine of the last clear chance. That doctrine rightly applied in the Chunn case amounts to no more than this: That a negligent defendant will be held to be liable to a negligent plaintiff if the defendant, aware of plaintiff's peril, *or unaware of it only through carelessness*, had in fact a later opportunity than the plaintiff to avert the accident" (italics ours).

Respondent therefore prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

FRANK PACE,

Counsel for Respondent.